

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WILLIAM R. SCAGGS JR.,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
DEFENSE INSPECTOR GENERAL,

Defendant.

Case No. C08-05544RJB

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION

This matter comes before the court on Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Dkt. 5); Plaintiff's Motion for Summary Judgment (Dkt. 9, 10) (it appears that Plaintiff mistakenly did not include exhibits in his first motion and filed the same motion again with exhibits); and Defendant's Motion to Stay Briefing on Plaintiff's Motion for Summary Judgment (Dkt. 12). The court has considered the pleadings filed in support of and in opposition to the motions and remainder of the file herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

On September 10, 2008, Plaintiff, who is proceeding *pro se*, filed a complaint against the Defendant, United States Department of Defense Inspector General ("DODIG"). Dkt. 1. The Plaintiff alleges that the DODIG has "refused to provide all documents associated with [his] case file directly to [him] in accordance with DoD 5400.7-R, dated September 1998, section C1.5.9.1." Dkt. 1 at 2. The Plaintiff asserts that he "specifically objected to the referral of any documents to the originators for release determination." Dkt. 1 at 2. The Plaintiff is seeking "full

1 disclosure of all documents concerning [his] case” from DODIG. Dkt. 1 at 3.

2 On May 1, 2007, the OIG DoD FOIA Requester Service Center/Privacy Act Office
3 (“DODIG FOIA Office”) received an email FOIA request dated April 20, 2007, from Mr. Scaggs.
4 Dkt. 6 ¶ 8. On June 6, 2007, Darryl R. Aaron, Chief FOIA Office, responded to Mr. Scaggs’
5 request by releasing 327 pages of responsive documents and sending a letter containing specific
6 instructions for appealing the decision regarding the release of documents (“IDA decision letter”).
7 Dkt. 6 ¶ 11. The IDA decision letter stated in part:

8 You have the right to appeal this decision of withholding information from you that is
9 responsive to your FOIA request. If you should appeal, your appeal must be in writing to
the Appellate Authority:

10 Mr. John R. Crane
11 Assistant Inspector General
12 Office of Communications and Congressional Liaison
400 Army Navy Drive, Room 1034
Arlington, Virginia 22202-4704

13 To be considered, your appeal should be postmarked no later than 60 calendar days from
14 the date of this letter. Please give your reasons for the appeal and write “Freedom of
15 Information Act Appeal” printed clearly on the envelope and the letter. Also reference
your FOIA request number 07-0171 in your appeal letter, and include a copy of this letter.

16 Dkt. 6 at 13. Mr. Aaron also gave notice to Mr. Scaggs that DODIG was referring several
17 records to the Department of the Air Force for release determination. Dkt. 6 at 12. The IDA
18 decision letter stated in part:

19 We have identified documents that did not originate with our agency. The Department of
20 Defense FOIA referral policy requires that the document originator make the release
determination and a direct response to the requester.

21 Dkt. 6 at 12. Mr. Scaggs’ request and records were subsequently referred to several
22 organizations. See Dkt. 6 ¶¶ 12 - 17. Mr. Scaggs’ request and records were ultimately received
23 by the Department of the Air Force Reserve Command FOIA Office (“AFRC FOIA Office”).

24 Dkt. 6 ¶ 16. On October 9, 2007, Colonel John L. Hayes, USAF, Director of Communications,
25 AFRC FOIA Office, sent a decision letter (“AFRC decision letter”) to Mr. Scaggs releasing 164
26 pages of material. Dkt. 7 at 6. Mr. Hayes also notified Mr. Scaggs of the appeal procedures in
27 the AFRC decision letter. *Id.* Chief Master Sergeant Calvin E. Dixon, USAF, who oversees the
28 FOIA program for the AFRC, stated that as of November 10, 2008, the AFRC FOIA Office had

1 not received an appeal request from Mr. Scaggs. Dkt. 7 ¶¶ 1, 9.

2 On July 14, 2007, Mr. Scaggs alleges that he sent a letter to the “DoD IG FOIA officer”,
3 via certified mail, in response to the IDA decision letter. Dkt. 10 at 2, 6, 7. Mr. Scaggs’ July 14,
4 2007 letter (“Decision Response Letter”) was addressed to:

5 Inspector General
6 Dept of Defense
7 Attn: FOIA Officer
400 Army Navy Dr.
Arlington, VA 22202-4704

8 Dkt. 10 at 6, 7. Mr. Scaggs stated in his letter that he was “still waiting to receive all records
9 responsive to [his] request” and that Sandra Hill, the point of contact provided by Mr. Aaron in
10 the IDA decision letter, had not returned his phone calls. Dkt. 10 at 6. Mr. Scaggs also objected
11 to the referral of his FOIA request and records to the Department of the Air Force. Dkt. 10 at 6.
12 Mr. Scaggs stated in his Decision Response Letter:

13 In accordance with DoD 5400.7-R, dated September 1998, section C1.5.9.1, I object to
14 the referral of my FOIA request and would like your office provide [sic] a complete
disclosure of the records that I originally requested on April 20, 2007.

15 Dkt. 10 at 6. Mr. John R. Crane, the Assistant Inspector General for the Office of
16 Communications and Congressional Liaison, Office of the Inspector General of the Department of
17 Defense, stated in his declaration that the FOIA Office did not receive Mr. Scaggs’ Decision
18 Response Letter. Dkt. 6 ¶19.

19 On July 25, 2007, Mr. Scaggs submitted a follow up letter to the “DoD IG FOIA officer”
20 at the same address as his Decision Response Letter. Dkt. 6 at 19. Mr. Scaggs’ July 25, 2007
21 letter (“Follow-Up Letter”) stated:

22 Please reply to my previous letter dated July 14th in writing and process my overdue FOIA
23 request from April 30th, 2007, as soon as possible.

24 Dkt. 6 at 19. Mr. Scaggs’ Follow-Up Letter was received on July 27, 2007 by the FOIA Office.
25 Dkt. 6 ¶ 18.

26 Mr. Crane stated in his declaration that a staffer with the FOIA Office made three phone
27 calls to Mr. Scaggs between July 25, 2007 and August 7, 2007, and “left detailed voice messages
28 with a contact number each time.” Dkt. 6 ¶ 20. After August 7, 2007, there appears,

1 from the record, to be no further communications between the Mr. Scaggs and the FOIA office,
2 Mr. Crane, or DODIG.

3 II. DISCUSSION

4 A complaint must be dismissed under Fed. R. Civ. P. 12(b)(1) if, considering the factual
5 allegations in the light most favorable to the plaintiff, the action: (1) does not arise under the
6 Constitution, laws, or treaties of the United States, or does not fall within one of the other
7 enumerated categories of Article III, Section 2, of the Constitution; (2) is not a case or
8 controversy within the meaning of the Constitution; or (3) is not one described by any
9 jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *see* 28 U.S.C. §§ 1331 (federal
10 question jurisdiction) and 1346 (United States as a defendant). When considering a motion to
11 dismiss pursuant to Rule 12(b)(1), the court is not restricted to the face of the pleadings, but may
12 review any evidence to resolve factual disputes concerning the existence of jurisdiction.
13 *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052
14 (1989); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983). A federal court
15 is presumed to lack subject matter jurisdiction until plaintiff establishes otherwise. *Kokkonen v.*
16 *Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); *Stock West, Inc. v. Confederated*
17 *Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Therefore, plaintiff bears the burden of proving the
18 existence of subject matter jurisdiction. *Stock West*, 873 F.2d at 1225; *Thornhill Publishing Co.,*
19 *Inc. v. Gen'l Tel & Elect. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

20 Where a FOIA plaintiff attempts to obtain judicial review without first exhausting
21 administrative remedies, the lawsuit is subject to dismissal for lack of subject matter jurisdiction.
22 *See Hymen v. Merit Sys. Protection Bd.*, 799 F.2d 1421, 1423 (9th Cir. 1986) (*overruled on*
23 *other*
24 *grounds by Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990)). Where no attempt to comply
25 fully with agency procedures has been made, the courts will assert their lack of jurisdiction under
26 the exhaustion doctrine. *United States v. Steele*, 799 F.2d 461, 466 (9th Cir. 1986). A party who
27 makes a records request under the FOIA “must request specific information in accordance with
28 published administrative procedures,” and “have the request improperly refused before the party

1 can bring” suit in federal court. *Id.* The purpose underlying the exhaustion doctrine include the
2 opportunity for the agency to exercise its discretion and expertise and the opportunity to make a
3 record for the district court to review. *Id.* (citation omitted).

4 Here, Mr. Scaggs asserts that the DODIG has “refused to provide all documents
5 associated with [his] case file directly to [him] in accordance with DoD 5400.7-R, dated
6 September 1998, section C1.5.9.1.” Dkt. 1 at 2. The DODIG argues that the Mr. Scaggs’
7 complaint should be dismissed because he does not have subject matter jurisdiction due to lack of
8 exhaustion of administrative remedies.

9 Mr. Scaggs did not exhaust his administrative remedies because he may still object to the
10 referral of his request and records or make an appeal request. Department of Defense FOIA
11 Regulation 5400.7-R, “DoD Freedom of Information Act Program,” Chapter 1.5.9.1 states in
12 relevant part:

13 While referrals to originators of information result in obtaining the best possible decision
14 on release of the information, the policy does not relieve DoD Components from the
15 responsibility of making a release decision on a record should the requester object to
16 referral of the request and the record. Should this situation occur, DoD Components
17 *should* coordinate with the originator of the information prior to making a release
18 determination.

19 DoD 5400.7-R, September 1998, Chapter 1.5.9.1. In the IDA decision letter, Mr. Aaron notified
20 Mr. Scaggs of the referral of his request and records to the Department of the Air Force. Mr.
21 Scaggs could have objected at that point, but, as explained above, the DODIG FOIA office never
22 received Mr. Scaggs’ Decision Response Letter objecting to the referral. The only letter received
23 by the DODIG FOIA office was the Follow-Up Letter by Mr. Scaggs, which did not contain an
24 objection to the referral. Since the DODIG FOIA office has not received Mr. Scaggs’ objection,
25 he may still pursue that remedy with the DODIG FOIA office. Further, Mr. Scaggs could have
26 renewed his objection to the referral of his request and records after each subsequent referral from
27 the DODIG to the ultimate originator, AFRC FOIA office. It appears from the record that Mr.
28 Scaggs did not object after each referral. Therefore, Mr. Scaggs may still object.

Additionally, Mr. Scaggs could have appealed the IDA decision letter and the AFRC
decision letter. While both the DODIG and AFRC decision letters state that Mr. Scaggs has 60
days to submit an appeal request, DoD 5400.7-R, states:

1 If no appeal is received, or if the appeal is postmarked after the conclusion of this 60-day
2 period, the appeal may be considered closed. *However, exceptions to the above may be
considered on a case by case basis.* (emphasis added).

3 DoD 5400.7-R, September 1998, Chapter 5.3.3.1. Both the DODIG and the AFRC state that
4 they have not received an appeal request from Mr. Scaggs, but this does not prevent Mr. Scaggs
5 from attempting to seek an appeal, if appropriate.

6 Mr. Scaggs has not exhausted his administrative remedies since he may still seek an
7 objection to the referrals and seek an appeal. Since Mr. Scaggs did not exhaust his administrative
8 remedies, the court lacks subject matter jurisdiction over his claims.

9 Finally, the DODIG FOIA office was not given opportunity to create a record for review
10 because a final decision or refusal was not made. A decision or refusal regarding Mr. Scaggs'
11 objection did not occur because the DODIG FOIA office did not receive notice of an objection.
12 The DODIG FOIA office never received Mr. Scaggs' Decision Response Letter containing the
13 objection to referral. Mr. Scaggs' Follow-Up Letter, which was received by the DODIG FOIA
14 office, does not contain an objection to the referral. Finally, Mr. Scaggs never made phone
15 contact with the DODIG FOIA office to put DODIG on notice of his objection to the referral.
16 Since there was no notice of Mr. Scaggs' objection, nor an appeal, the DODIG FOIA office did
17 not have an opportunity to make a decision on Mr. Scaggs' objection or to improperly refuse Mr.
18 Scaggs' objection. Since there was no decision or refusal by DODIG, there was no opportunity to
19 create a record for review.


20 For the foregoing reasons, the Defendant's motion to dismiss for lack of subject matter
21 jurisdiction should be granted.

22 III. ORDER

23 Therefore, it is hereby **ORDERED** that Defendant's Motion to Dismiss for Lack of
24 Subject Matter Jurisdiction (Dkt. 5) is **GRANTED**; Plaintiff's claims are **DISMISSED**
25 **WITHOUT PREJUDICE**; Plaintiff's pending Motion for Summary Judgment (Dkt. 9 and 10) is
26 **DENIED** as moot; and Defendant's pending Motion for Stay (Dkt. 12) is **DENIED** as moot.

1 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
2 to any party appearing *pro se* at said party's last known address.

3 IT IS SO ORDERED this 16th day of December.

4
5 
6 ROBERT J. BRYAN
7 United States District Judge
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28